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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. RICHARD WARREN EMORY, Defendant and Appellant.	C053749 Superior Ct. Nos. 05F02744 05F06663

In case No. 05F02744, defendant Richard Warren Emory was convicted of robbery (Pen. Code, § 211, count one)[1] with a true finding he personally used a deadly and dangerous weapon (§ 12022, subd. (b)(1)), assault with a deadly weapon (§ 245, subd. (a)(1), count two) and terrorist threats (§ 422, count three). It was also found true that he had sustained a prior serious felony conviction (§§ 667, subds. (a), 667, subds. (b)-(i), 1170.12). After he was convicted in case No. 05F02744, in case

[1] Further undesignated statutory references are to the Penal Code.

No. 05F06663, defendant pled guilty to a felony failure to appear (§ 1320.5) and admitted an enhancement that he was out of custody on a pending felony offense at the time he committed the current felony offense. (§ 12022.1.) Defendant appeals these convictions, arguing the court violated his due process rights by permitting evidence of his prior bad acts, committed reversible error by misinstructing on the presumption of innocence and the burden of proof, and erred in finding his prior conviction in Iowa constituted a serious felony. In supplemental briefing, defendant contends there was insufficient evidence to support his robbery conviction because there was no taking of personal property from the person by force or fear. We shall affirm.

FACTUAL BACKGROUND

On March 22, 2005, around 6:30 p.m. Mshindi Cherry was working as a loss prevention officer at the Food Source store. As he was watching the surveillance cameras, Cherry saw defendant put a king-sized Snickers candy bar in his pants pocket. Cherry watched defendant go to the dairy section where he picked up some cheese and was joined by a woman with a basket. Defendant spoke with the woman, put the cheese in the basket and the pair continued to shop. The couple temporarily parted ways and defendant picked up a bottle of silver polish and hid it in his sleeve. The pair reunited in the meat section of the store and went to the check stand.

The woman stayed in line at the check stand, and defendant continued toward the door of the store. On his way out, the

bottle of silver polish fell out of his sleeve. He picked it up, put it on the check stand and left the store.

Cherry followed defendant out of the store and stopped him as he was getting in a white van. Cherry identified himself as store security and was wearing a badge which also so identified him. Cherry told defendant they needed to go back in to the store. Initially defendant voluntarily went with Cherry back towards the store, but then changed his mind, yanked his arm away from Cherry and said, “I’m not going anywhere with you.” Defendant then lunged at Cherry and said, “Get away from me.” Cherry thought defendant was going to hit him, so he sprayed pepper spray in defendant’s face.

Wiping the pepper spray from his face, defendant ran away from the store. Cherry followed in pursuit and as he gained on defendant, defendant pulled out a knife and swung it at Cherry, sweeping across his chest. Cherry backed up. Defendant fled again. Cherry followed at a distance to get a general idea of where defendant was going. As Cherry followed, defendant yelled, “I’m gonna kill you. I’m gonna fucking kill you. Get away from me.” Cherry stopped the pursuit, went to the nearest house, asked the resident to call 9-1-1, and returned to the store. Officers were at the store when he arrived.

Officers were able to track down defendant’s identity through the white van, which had been left in the parking lot. Detective Greg Halstead prepared a photographic lineup which included a picture of defendant. Cherry immediately identified defendant.

Under evidence code section 1101, subdivision (b), (hereafter section 1101) evidence was also admitted regarding a 1985 misdemeanor conviction defendant sustained in North Dakota. Specifically, the following information from a certified court document was read to the jury: "On or about the above-stated date at approximately 9:45 p.m., the defendant, Richard W. Emory, threatened to stab or otherwise cut security officers for the Target store of Fargo with a knife when the security officers were pursuing defendant and another individual for shoplifting merchandise from the Target store."

Following his conviction on all counts in both cases and the true finding on the prior strike allegation, defendant was sentenced to an aggregate term of 11 years 8 months.

DISCUSSION

I

Defendant contends the trial court violated his due process rights by admitting evidence of his 1985 conviction under section 1101. He argues this "evidence was so inflammatory and its probative value so low that it[s] admission into evidence constituted an abuse of discretion so as to render the trial fundamentally unfair; thereby violating [defendant's] constitutional rights." We disagree.

Background

The prosecution filed a pretrial motion to admit defendant's 1985 North Dakota conviction for menacing under section 1101, arguing the conviction was relevant on the issues of intent, motive and common plan or scheme. Defendant argued

the issues were not necessarily in dispute, there was no indication of how much other evidence would go to those issues, a prior from 20 years ago did not establish a common plan or scheme, the evidence was not relevant on the issue of intent, and the evidence was more prejudicial than probative. The court took additional oral argument at the hearing on the motion. After considering the arguments of the parties, the court admitted the evidence, finding "Intent is certainly an issue in this case. It has been put directly at issue by the defense disputing what the defendant's intent was in the store, whether, in fact, any property was taken. [¶] The circumstances of the North Dakota matter are very similar to the circumstances here. [¶] Moreover, the circumstances are no more inflammatory than the current facts. So that danger has been eliminated. On the other side, certainly, this is an older offense. So the age mitigates against letting it in. [¶] On balance, I believe that the North Dakota incident is more probative than it is prejudicial. I will allow it in. There will be an appropriate limiting instruction."

Section 1101, subdivision (a) makes evidence of a person's character, as shown by evidence of specific instances of conduct, inadmissible to prove conduct on a specified occasion. Evidence that a person committed a crime may be admissible, however, to prove some fact, such as intent or knowledge, other than disposition. (§ 1101.)

The People offered evidence of defendant's 1985 offense to prove intent. "The least degree of similarity (between the

uncharged act and the charged offense) is required in order to prove intent. [Citation.]" (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402.)

Defendant claims there was insufficient similarity between the charged acts here and the 1985 acts in North Dakota to warrant admission. Specifically, he argues that in this case, he was alone as compared to the North Dakota case when he was with another person.[2] Further, he contends, in this case, he did not swing the knife at the security guard until after he had been chased and was off the property of the store, whereas there is no indication in the North Dakota incident if he threatened the officer with the knife while on the property of the store or not.

Defendant's attempts to distinguish these offenses are unavailing. They are sufficiently similar to be admitted on the issue of intent. In each case defendant was at a store where a security guard believed he had stolen merchandise. Upon the security guard pursuing and confronting him about the stolen merchandise, defendant threatened the security guard with a knife. In both incidents, defendant was willing to use a knife to facilitate his intent to steal merchandise from a store.

To be admitted to show intent, "the uncharged crimes need only be 'sufficiently similar [to the charged offenses] to

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[2] We note that the record indicates defendant was not alone in committing these offenses. He was in the store with a woman who appeared to be "shopping" with defendant.

support the inference that the defendant "'probably harbor[ed] the same intent in each instance.' [Citations.]" [Citation.] Considering the shared characteristics noted above, we conclude also that the trial court did not abuse its discretion when it ruled that the charged and uncharged offenses are sufficiently similar to support an inference that defendant harbored the same intent . . . in each instance.'" (*People v. Kipp* (1998) 18 Cal.4th 349, 371.)

"There is an additional requirement for the admissibility of evidence of uncharged crimes: The probative value of the uncharged offense evidence must be substantial and must not be largely outweighed by the probability that its admission would create a serious danger of undue prejudice, of confusing the issues, or of misleading the jury. [Citation.] On appeal, a trial court's resolution of these issues is reviewed for abuse of discretion. [Citation.] A court abuses its discretion when its ruling 'falls outside the bounds of reason.' [Citation.]" (*People v. Kipp, supra,* 18 Cal.4th at p. 371.)

The trial court did not abuse its discretion in admitting the evidence under section 352. As the court noted, the circumstances of the facts of the North Dakota incident were no more inflammatory or prejudicial than the facts in the case at bar. In addition, the evidence was presented by reading a copy of the certified court documents from North Dakota. Thus, the admission of the evidence did not consume undue time and there was no risk of it confusing the issues or misleading the jury. Also as noted by the court, the only matter of some concern was

the remoteness of the conviction. That is, that it was 20 years old. While the conviction was old, its remoteness was balanced by its relevance to the disputed issue of intent. (See *People v. Waples* (2000) 79 Cal.App.4th 1389, 1395.) Accordingly, there was no abuse of discretion in admitting defendant's 1985 North Dakota conviction.

II

Defendant next contends the trial court committed reversible error in misinstructing on the presumption of innocence and the burden of proof. Defendant's real complaint goes to the substance of the CALCRIM reasonable doubt instructions, Nos. 103 and 220.[3]

As given to the jury in this case, CALCRIM No. 220 (and No. 103 in relevant part) states, "The fact that a criminal charge or charges have been filed against the defendant is not evidence that the charges are true. You must not be biased against the defendant just because he has been arrested, charged with crimes, or brought to trial. [¶] A defendant in a criminal case is presumed to be innocent. This presumption requires the People prove each element of a crime and special allegation beyond a reasonable doubt unless I specifically tell you otherwise. [¶] Whenever I tell you the People must prove

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[3] Defendant argues as to both CALCRIM Nos. 103 and 220. The only instruction quoted and cited to in his argument is CALCRIM No. 220. The language in CALCRIM No. 103 (a pretrial instruction) and CALCRIM No. 220 (a posttrial instruction) is identical except for the first two sentences of CALCRIM No. 103, which are not the subject of defendant's complaint.

something, I mean they must prove it beyond a reasonable doubt. [¶] Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt. [¶] In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty."

Defendant's specific complaints are: (1) The instruction that "the jury was required to 'impartially compare and consider all the evidence' produced at trial in order to determine whether the prosecution had proved its case beyond a reasonable doubt undermined the presumption of innocence and supplanted it with a mere civil standard of impartiality[;]" and, (2) the error in the instruction relating to the presumption of innocence was "amplified by it[s] definition of proof 'beyond a reasonable doubt' as that which produced an 'abiding conviction' of the truth of the charge."

CALCRIM Nos. 103 and 220 are "based directly on Penal Code section 1096. The primary changes are a reordering of concepts and a definition of reasonable doubt stated in the affirmative rather than in the negative." (Spring 2006 commentaries to CALCRIM Nos. 220 and 103.) Section 1096 states: "A defendant in a criminal action is presumed to be innocent until the

contrary is proved, and in case of a reasonable doubt whether his or her guilt is satisfactorily shown, he or she is entitled to an acquittal, but the effect of this presumption is only to place upon the state the burden of proving him or her guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: 'It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.'"

The "Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt." (*In Re Winship* (1970) 397 U.S. 358, 364 [25 L.Ed.2d 368, 375].) The beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course. Indeed, so long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, the constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof. Rather, taken as a whole, the instructions must correctly convey the concept of reasonable doubt to the jury. (*Victor v. Nebraska* (1994) 511 U.S. 1, 5 [127 L.Ed.2d 583, 590] (*Victor*).)

When reviewing purportedly ambiguous jury instructions, we ask whether there is a reasonable likelihood jurors applied the

challenged instructions in a way that violated the constitution. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72 [116 L.Ed.2d 385, 399] (*Estelle*); *People v. Wade* (1995) 39 Cal.App.4th 1487, 1493.) The constitutional question in the present case, therefore, is whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard. (*Victor v. Nebraska, supra,* 511 U.S. at p. 6 [127 L.Ed.2d 583, 591].) In making this determination, we must keep in mind that instructions are not considered in isolation. Instead, whether instructions are correct and adequate is determined by consideration of the entire charge to the jury rather than by reference to parts of an instruction or from a particular instruction. (*People v. Holt* (1997) 15 Cal.4th 619, 677; *People v. Smithey* (1999) 20 Cal.4th 936, 963-964.)

Defendant relies on *Coffin v. United States* (1895) 156 U.S. 432 [39 L.Ed. 481] (*Coffin*) to support his claim. However, as the People note, defendant is misreading the holding in *Coffin*. In *Coffin*, the Supreme Court concluded the presumption of innocence is distinct from the doctrine of reasonable doubt and that the trial court erred by failing to instruct on the former. The court held the presumption of innocence to be a presumption of law in favor of the accused. The trial court's reasonable doubt instruction advised the jurors about "'weighing all the proofs and looking only to the proofs[.]'" (*Coffin, supra,* 156 U.S. at p. 461.) However, the trial court had expressly refused to include the presumption of innocence among those proofs.

This instruction confined the jurors to those matters that were admitted to their consideration by the court. The Supreme Court deemed the instruction erroneous, reversed the judgment, and remanded the case with directions to grant a new trial. (*Id.* at pp. 460-463.)

While the reasonable doubt instruction in *Coffin* did employ the phrases "'weighing all the proofs'" and "'impartially and honestly entertain the belief'" (*Coffin, supra,* 156 U.S. at p. 461), that language was not the basis upon which the Supreme Court found it inadequate. The Supreme Court found the instruction inadequate because it omitted any reference to the presumption of innocence. The focus of the opinion was on the necessity of including presumption of innocence and not the doctrine of reasonable doubt. Here, unlike *Coffin,* the court properly instructed on the presumption of innocence.

CALCRIM Nos. 220 and 103 are restatements of CALJIC No. 2.90.[4] When read in the context of the entire instruction, "The United States Supreme Court rejected a constitutional challenge

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[4] CALJIC No. 2.90 stated: "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt. [¶] Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

to CALJIC No. 2.90 in part on the rationale that 'the entire comparison and consideration of all the evidence' language 'explicitly told the jurors that their conclusion had to be based on the evidence in the case.' (*Victor v. Nebraska* (1994) 511 U.S. 1, 16 [127 L.Ed.2d 583].)" (*People v. Hernandez Rios* (2007) 151 Cal.App.4th 1154, 1157.) Where CALCRIM No. 220 uses the verbs "compare and consider all the evidence[,]" CALJIC No. 2.90 uses the nouns requiring "the entire comparison and consideration of all the evidence" by the jury. CALCRIM No. 220 delivers the same instruction to the jury. (*People v. Hernandez Rios, supra,* at p. 1157; see also *People v. Guerrero* (2007) 155 Cal.App.4th 1264, 1267 (*Guerrero*).)

Defendant also challenges the use of the phrase "abiding conviction" in CALCRIM Nos. 103 and 220. CALCRIM No. 220 defines proof beyond a reasonable doubt as proof that leaves one with an "abiding conviction." "The definition of reasonable doubt in CALCRIM No. 220 is derived from CALJIC No. 2.90 which in turn was taken directly from the language of section 1096 which, when given, requires 'no further instruction . . . defining reasonable doubt . . . .' (§ 1096a.) In *Victor v. Nebraska, supra,* 511 U.S. 1, 14-15 [127 L.Ed.2d 583, 114 S.Ct. 1239], the United States Supreme Court sustained the then language of CALJIC No. 2.90, and stated: 'An instruction cast in terms of an abiding conviction as to guilt, without reference to moral certainty, correctly states the government's burden of proof.'" (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1239.) The California Supreme Court-in construing former CALJIC No.

2.90-has held an instruction cast in terms of an abiding conviction as to guilt, without reference to moral certainty, correctly states the government's burden of proof. (*People v. Brown* (2004) 33 Cal.4th 382, 392, citing *Victor v. Nebraska, supra,* 511 U.S. at pp. 14-15 [127 L.Ed.2d 583].) The California Supreme Court has also rejected similar challenges to the "abiding conviction" language. (*People v. Cook* (2006) 39 Cal.4th 566, 601; *People v. Freeman* (1994) 8 Cal.4th 450, 501-505.)

Despite defendant's lengthy argument that he was prejudiced by the wording of the CALCRIM instructions, as long as the trial court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, the Constitution does not require any particular form of words be used in advising the jury of the government's burden of proof. Rather, taken as a whole, the instructions must correctly convey the concept of reasonable doubt to the jury. (*People v. Mayo* (2006) 140 Cal.App.4th 535, 542.) Employing plain language, CALCRIM Nos. 103 and 220 correctly conveyed the concept of reasonable doubt in the instant case and defendant's contention must be rejected.

III

Defendant next contends the trial court erred in finding his prior Iowa conviction for theft constituted a serious felony within the meaning of section 667, subdivision (a). We disagree.

Background

Following the entry of the jury verdict in case No. 05F2744 and defendant's plea in case No. 05F06663, bifurcated proceedings were held regarding the prior conviction allegations. The People alleged defendant had been convicted in 1980 of second degree robbery in Iowa while armed with a firearm. (Iowa Code, § 711.3.)

Defendant contended at the trial court that Iowa theft/robbery statutes did not include the California requirement for a robbery that there be intent to permanently deprive or that the property be taken from the person or his immediate presence.

The court read and considered the written and oral arguments of the parties and found the Iowa conviction involved "conduct which satisfied[d] all the elements of a California robbery."

Analysis

In determining whether a foreign conviction counts as a serious felony, the trial court considers the entire record of conviction. (*People v. Riel* (2000) 22 Cal.4th 1153, 1204-1205 (*Riel*) [§ 667.5, subd. (f)]; *People v. Myers* (1993) 5 Cal.4th 1193, 1195 [§ 667, subd. (a)]; *People v. Jones* (1999) 75 Cal.App.4th 616, 632 [Three Strikes law] (*Jones*).) The former rule that the trial court may consider only the "least adjudicated elements of the prior conviction" (*People v. Crowson* (1983) 33 Cal.3d 623, 634, italics omitted), is no longer the law in California. (*Riel, supra*, at p. 1205.) However, if the

record fails to disclose any of the facts of the prior offense, the trial court must presume the conviction was for the least offense punishable under the foreign law. (*Jones, supra*, at p. 632.)

Defendant was convicted of second degree robbery in Iowa. In Iowa, a robbery is defined as: "A person commits a robbery when, having the intent to commit a theft, the person does any of the following acts to assist or further the commission of the intended theft or the person's escape from the scene thereof with or without the stolen property: [¶] 1. Commits an assault upon another. [¶] 2. Threatens another with or purposely puts another in fear of immediate serious injury. [¶] 3. Threatens to commit immediately any forcible felony. [¶] It is immaterial to the question of guilt or innocence of robbery that property was or was not actually stolen." (I.C.A., § 711.1.)[5] As relevant here, under the Iowa codes, "[a] person commits theft when the person does any of the following: [¶] 1. Takes possession or control of the property of another, or property in the possession of another, with the intent to deprive the other thereof. . . ." (I.C.A., § 714.1, subd. (1)); see also *State v.*

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[5] The record indicates that defendant was convicted of violating Iowa section 711.3 (Iowa). Section 711.3 refers to what classification the robbery has and provides: "All robbery which is not robbery in the first degree is robbery in the second degree. Robbery in the second degree is a class "C" felony." The elements of robbery are not further explicated in section 711.3. Accordingly, we look to the statute in which the elements of the offense are actually delineated.

Rich (Iowa 1981) [305 N.W.2d 739, 746].) Contrary to defendant's claim, the Iowa Supreme Court has held "that an intent to *permanently* deprive the owner of his property is an essential element of theft under section 714.1(1)." (*State v. Schminkey* (Iowa 1999) [597 N.W.2d 785, 789] original italics.)

Furthermore, in California the requirement that there be an intent to permanently deprive the victim of their property is not literal. (*People v. Avery* (2002) 27 Cal.4th 49, 55.) "[A]n intent to take the property for so extended a period as to deprive the owner of a major portion of its value or enjoyment satisfies the common law, and therefore California, intent requirement. . . . The reference to the intent to permanently deprive is merely a shorthand way of describing the common law requirement and is not intended literally." (*Ibid.*) "'[T]he intent to deprive an owner of the main value of his property is equivalent to the intent to permanently deprive an owner of property.'" (*Id.* at p. 57.) This is entirely consistent with the declaration of Iowa law that the intent to deprive "means to **permanently** withhold, or to withhold for so long, or under such circumstances, that its benefit or value is lost; or the property is disposed of so that it is unlikely the owner will recover it. [*State v. Berger,* 438 N.W.2d 29, 31 (Iowa Ct.App.1989)]." (*State v. Fuentes* (Iowa App. 2004) [690 N.W.2d 695].) Thus, the intent required for robbery in California and in Iowa is the same.

Because, at the time of defendant's Iowa conviction, the statutory elements of a second degree robbery in Iowa matched

the elements for a California robbery, defendant's Iowa conviction qualified as a serious felony and strike under California law. Thus, there was no error in the trial court so finding.

IV

In supplemental briefing, defendant contended there was insufficient evidence to support the robbery conviction because there "was no taking of personal property from the person or immediate presence of another by force or fear." Defendant noted the issue was then pending before the California Supreme Court. The court has since decided the issue in *People v. Gomez* (2008) 43 Cal.4th 249 (*Gomez*).

Section 211 provides, "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." In *Gomez, supra,* 43 Cal.4th at p. 256, our Supreme Court held: "[A] taking is not over at the moment of caption; it continues through asportation. . . . [A] robbery can be accomplished even if the property was peacefully or duplicitously acquired, if force or fear was used to carry it away." (*Ibid.,* citing *People v. Anderson* (1966) 64 Cal.2d 633.) Our Supreme Court further held, "'[M]ere theft becomes robbery if the perpetrator, having gained possession of the property without use of force or fear, resorts to force or fear while carrying away the loot.'" (*Gomez, supra,* 43 Cal.4th at p. 257, quoting *People v. Cooper* (1991) 53 Cal.3d 1158, 1165, fn. 8; see also *People v. Estes* (1983) 147 Cal.App.3d 23, 27-28 (*Estes*);

People v. Kent (1981) 125 Cal.App.3d 207, 213; *People v. Perhab* (1949) 92 Cal.App.2d 430, 434-435.)

The *Gomez* court explained that robbery is a continuing offense elevated from the offense of larceny by two aggravating circumstances: the taking must be accomplished by force or fear, and the property must be taken from the victim or in the victim's presence. The element of “taking” has two aspects as well: “caption,” or achieving possession of the property, and “asportation,” or carrying it away. (*Gomez, supra,* 43 Cal.4th at pp. 254-255.) The "person or immediate presence" requirement of Penal Code section 211 can arise when the goods are captured as well as when they are asported, because robbery is a continuous offense. “If the aggravating factors are in play at any time during the period from caption through asportation, the defendant has engaged in conduct that elevates the crime from simple larceny to robbery.” (*Gomez, supra,* at p. 258.)

In reaching these conclusions, the Court relied on *Estes.* In *People v. Estes, supra,* 147 Cal.App.3d at page 26, the defendant was observed entering a Sears store wearing only a T-shirt and jeans. A store security guard saw the defendant take both a vest and a coat and wear them out of the store without paying for them. The security guard confronted the defendant. The security guard asked the defendant to return to the store. The defendant refused and walked away. The security guard then attempted to detain the defendant. The defendant pulled out a knife and swung it at the guard. Finally, the defendant threatened to kill the security guard. The Court of Appeal for

the First Appellate District held, "Whether defendant used force to gain original possession of the property or to resist attempts to retake the stolen property, force was applied against the guard in furtherance of the robbery and can properly be used to sustain the conviction." (*Id.* at p. 28.)

In this case, defendant's combative encounter occurred when Cherry attempted to stop him from leaving the store. Defendant lunged and Cherry thought defendant was going to hit him. Defendant then ran from Cherry and as Cherry got closer to him, defendant pulled out a knife and swung it at Cherry, sweeping across his chest. Defendant then threatened to kill Cherry. As in *Estes*, these acts constitute substantial evidence that defendant used force and fear in an effort to complete the robbery. (*People v. Gomez, supra,* 43 Cal.4th at pp. 258-259; *People v. Anderson, supra,* 64 Cal.2d at p. 638; *People v. Estes, supra,* 147 Cal.App.3d at p. 28.)

DISPOSITION

The judgment is affirmed.

MORRISON, J.

We concur:

BLEASE, Acting P. J.

ROBIE, J.